

This is a transcription of episode 12 of Season Two of In the Dark. Italics indicate audio. Musical notations and other production elements aren't included. Because there may be imprecisions in the transcript, the audio should be considered the official record of the episode.

Episode 12: Before the Court

Hi In the Dark listeners. We're back with an all new set of episodes about the case of Curtis Flowers. If you haven't listened to the second season of In the Dark yet, stop, go back and listen to it first.

One more thing: this episode contains a word that's offensive.

In the spring of 2010, a letter arrived at Diane Copper's house in Winona, Mississippi.

Diane Copper: I opened the letter. Wow.

It was a jury summons. A letter asking Diane to appear at the courthouse in Winona a few weeks later. Diane said she knew right then what trial it had to be — the State of Mississippi versus Curtis Flowers—the sixth one.

Diane Copper: Curtis Flowers. A big trial.

Hundreds of people in Montgomery County got letters like this one. Flancie Jones got a letter and when it came time to go to court, she got all dressed up.

Flancie Jones: I wore my lowrider jeans. And I'd wear, you know, these little old shoes with, the heel was out. But I dressed my part.

Flancie drove down to the courthouse.

Flancie Jones: There's so many of us. We were just like flies. It was so many that you couldn't park outside. You couldn't walk in that entryway. It was just a million people there.

There were 600 prospective jurors. And that group of 600 had to be trimmed down to just 12. Twelve, plus three alternates. To do that, Flancie, Diane, and the others would have to go through jury selection—through the process that's supposed to help choose a jury of 12 people who can be fair and impartial.

And in the Curtis Flowers' case, that process took five days. Five days of being questioned, first by the Judge Joey Loper. A lot of prospective jurors were sent home after that. And then the

remaining prospective jurors were questioned by the lawyers. District Attorney Doug Evans asked the questions for the prosecution.

Flancie Jones: The D.A. just was uh, he pretty much was running the show.

Doug Evans asked the prospective jurors, do you know where Tardy Furniture is, the store where the murders happened? Have you shopped there? Have you been sued by Tardy Furniture? He asked a lot of questions about whether the jurors knew Curtis or had lived near him or his family. This is prospective juror Alexander Robinson.

Alexander Robinson: The lawyers, they grilled us. They asked a lot of questions. All kinds of questions.

When those days of questioning were over, the prospective jurors were sent out of the courtroom and they waited in the hallway while the judge met with Doug Evans and the defense team. And this is when the jury for Curtis Flowers' sixth trial was chosen.

Then the bailiff came out and told everyone to go back into the courtroom. And Judge Loper called out the names of the people who'd been chosen to sit on the jury. One by one, Judge Loper called the names of one white juror, then another, then another. When the jury was finally all seated, there were 11 white jurors and one black juror, Alexander Robinson.

Flancie, Diane and the other prospective black jurors were all dismissed.

As to why they didn't end up on the jury:

Flancie Jones: I don't know. They don't say why. They don't say why. They just say you can go.

Flancie and Diane and the others didn't realize it, but in that meeting, when they were out in the hallway, Doug Evans had used his strikes to strike one white prospective juror and five black prospective jurors.

When the trial began later that day, Curtis Flowers looked over at a jury box that was almost entirely white. This in a county that was almost fifty percent black.

That jury listened to seven days of testimony and then they deliberated for just 29 minutes.

They convicted Curtis Flowers and they sentenced him to death.

Ever since that day, Curtis' lawyers have been trying to convince the courts to overturn Curtis' conviction in that sixth trial, because, they say, D.A. Doug Evans violated the Constitution when he struck some of those black prospective jurors. The defense said Doug Evans did it intentionally because they were black.

Curtis appealed to the Mississippi Supreme Court and the court looked at that conviction twice. But both times the court found nothing wrong and Curtis' conviction stood. So Curtis' lawyers tried one more thing. They tried to get the case in front of the U.S. Supreme Court.

It was a long shot. But then, late one Friday afternoon in November:

NEWS ARCHIVE: The United States Supreme Court has granted Curtis Flowers' petition for review. The Court will determine whether there was racial bias...

This is In the Dark, an investigative podcast by APM Reports. I'm Madeleine Baran. This season is about the case of Curtis Flowers, a black man from a small town in Mississippi who's spent the past 22 years fighting for his life — and a white prosecutor who's spent that same time trying just as hard to execute him.

The case of Curtis Flowers, his appeal, is now moving quickly. The Supreme Court will hear oral arguments tomorrow. And the Court will be focusing on one thing — whether D.A. Doug Evans violated the Constitution when he struck black people from the jury pool in Curtis' latest trial, trial six. If they decide that Evans did, they'll overturn Curtis' conviction. If not, Curtis will move one step closer to execution.

And so, we're back with an all new set of episodes that will take you to the Supreme Court, to the oral arguments, and back to Winona, where Curtis' family is awaiting the Court's decision, and back to District Attorney Doug Evans, the man whose decision to try Curtis six times is how we got here in the first place. And we'll tell you about some new things we've uncovered. That's all coming up in the next four episodes of In the Dark.

Curtis Flowers' case is going to come down to what the Supreme Court decides. The Supreme Court doesn't usually make decisions out of the blue. It makes them based on cases that have come before it in the past.

And so to understand what's going to happen in Curtis' case, you have to know what's happened before, when other big cases of alleged racial discrimination in jury selection have gone before the Supreme Court. Because these other cases are clues to how the Court will decide Curtis' case.

And probably the biggest one of those cases is one we told you about earlier in this season. It's called *Batson v. Kentucky*. And it happened back in 1986.

James Batson was a black man who was charged with burglary and receiving stolen goods and he was found guilty by an all-white jury. Batson's attorney argued before the Supreme Court that in jury selection it was clear that the prosecutor was striking black people because of their race and that doing that violated the Constitution.

David Niehaus: When the prosecutor does this, he is attacking the democratic aspect of the jury wherein the community consents to the conviction.

The Supreme Court agreed and Batson won his case and a principle was established, that using strikes to dismiss prospective jurors solely because of their race was unconstitutional.

After the Batson decision, whenever a defense attorney was suspicious that a prosecutor was striking a black person because of their race, that attorney could file a Batson challenge and the judge could force the prosecutor to give the reasons why he struck that particular juror. The prosecutor could give basically any reason as long as that reason wasn't that the person was black.

It wasn't that hard for prosecutors to get around Batson.

Stephen Bright: Unfortunately, it has been virtually impossible to succeed on Batson claims, just about as difficult as it was before Batson was decided.

This is a defense attorney named Stephen Bright. He's argued several of these kinds of cases before the Supreme Court.

Stephen Bright: Almost anyone can think up reasons that don't involve race for why a juror has been struck. The real question is, how do you know whether, when a strike is being used, that it's being used because of race or it's being used for some other reason.

Madeleine Baran: Because you have to in a way peer into the mind of the prosecutor.

Stephen Bright: You have to peer into the mind of the prosecutor and it's of course impossible to do that.

Since Batson, the Court has come up with some ways to try to peer into the minds of prosecutors, to find out whether they're telling the truth when they claim their strikes aren't about race.

For example, in 2005 there was a case out of Texas called Miller-El, a murder case. At trial the prosecution struck 10 of the 11 African-Americans who were in the jury pool. They gave a bunch of reasons, none of them having to do with race. But it turned out this district attorney's office in Texas actually had a written policy about race and jury selection.

Stephen Bright: There was a manual which the prosecutor's office had used that said don't allow any Jews, blacks, dagoes or other racial minorities to serve on the jury. And the court in a decision by Justice Souter held that it just blinked at reality to say that there was any reason for picking the jury other than race.

Madeleine Baran: That it blinked at reality?

Stephen Bright: Right. Said you just can't look at this and not realize that it was race discrimination.

David Souter: The state court's findings of no discrimination were unreasonable. The case is remanded for entry of judgment for Miller-El.

A similar thing happened in a case just three years ago, in 2016, in a case that Stephen Bright argued.

The defendant was a man named Timothy Foster. He'd been sentenced to death for murder. And in this case, like the others, Foster tried to appeal, saying that the prosecutor struck black people from the jury because of their race. And the prosecution responded by saying something familiar; we didn't strike those people because they were black. The prosecution gave a bunch of other reasons. But Stephen Bright didn't buy it. He suspected something else was going on. So he made a public records request for the prosecutors' notes from jury selection.

And what the prosecution had written in those notes changed the entire case.

Stephen Bright: They had highlighted the names of all the jurors and had law enforcement people and members of their office investigate just the black people. They referred to the black people as B1, B2, B3 and so forth. They had had an investigator compare the blacks against each other in case, as it said in the memo, it comes down to having to put a black on the jury. In other words, if they ran out of strikes, they might have to take one black. But it was clear that their major purpose in jury selection was to exclude African Americans from participating in Foster's jury.

Madeleine Baran: So nothing there is subtle.

Stephen Bright: Nothing is subtle in that, right. It was very overt, but only because the prosecutor's file came to light. If it had not, if the prosecutors had shredded the file or destroyed the file, Timothy Foster would have been executed.

The Supreme Court found in Foster's favor and his conviction was overturned. He's now awaiting a new trial.

Curtis Flowers' lawyers are relying on something that came out of both the Miller-El and Foster cases — the idea that you can look beyond the words that were said at trial to decide whether you believe the prosecutor's reasons for striking black jurors. You can look for evidence outside of the courtroom—evidence that shows the prosecutor has a pattern or practice of discriminating.

In the Curtis Flowers case, Curtis' lawyers aren't saying that there are written notes that show that Doug Evans wanted to strike black people in particular, like in the Foster case, or that Evans' office had a racist manual that instructed prosecutors to strike black people, like in the Miller-El case.

But they do have something else — a historical record — which Curtis' lawyers argue is just as damning.

Alison Steiner: There was this long history.

This is Alison Steiner. She's one of Curtis' attorneys. We interviewed her about this way back when we started reporting on Curtis' case in 2017.

Alison Steiner: He'd been found to have violated Batson by a trial judge in the second trial, by the Mississippi Supreme Court in the third trial.

In Curtis Flowers' second trial, Doug Evans told the trial judge that he struck a black prospective juror because the man was sleeping during jury selection and because Evans said he had heard through a quote, "confidential informant," that the man was a member of a gang. Neither of those things turned out to be true.

In Curtis' third trial, Evans used every single strike he had — all 15 of them — against black people. He didn't strike a single white person.

Ray Charles Carter: Wasn't no doubt that he was trying to get rid of all the black folks. That's exactly what he's trying to do.

This is one of Curtis' lawyers from that third trial, Ray Charles Carter.

Ray Charles Carter: I tell people I felt like I was back fifty years in time. And, I joked one time that I felt I was so far back that I started looking for Frederick Douglass to talk to him and ask him what he'd do in these old times. But of course, that was just a joke.

Our own analysis earlier this year found that Doug Evans and his office have a pattern of disproportionality striking black people from juries. Our reporting looked at trials in Evan's office since Evans became D.A. in 1992, and it found that under Evans' tenure his office struck black people from juries at nearly four and a half times the rate it struck white people.

Our findings have been cited in friend-of-the court briefs filed by the NAACP Legal Defense and Educational Fund and the Innocence Project New Orleans.

Curtis's lawyers argue that you can see this pattern of discrimination playing out if you look at the way Doug Evans went about selecting the jury in Curtis' sixth trial, the one that's currently on appeal at the Supreme Court.

Alison Steiner: In this case the prosecutor, if you look at how he did it, he seemed to be cherry-picking black jurors to be confronted and questioned.

Curtis's lawyers say Doug Evans asked black prospective jurors more questions than white prospective jurors—way more questions.

Curtis' lawyers actually calculated how many questions Doug Evans asked black and white prospective jurors. They found that Evans asked the 11 seated white jurors an average of one question each. But when the lawyers looked at the five prospective black jurors Evans struck, they found that Evans had asked those people an average of 29 questions each.

Curtis' lawyers argue that Evans was trying to tease out answers that he could use as excuses to strike the black jurors.

After all that questioning, when it came time to pick a jury, Doug Evans struck one white person and five black people.

When the judge asked Doug Evans to explain why he had struck those five black people, Evans told the judge it wasn't because they were black.

Evans said some of the black prospective jurors he struck knew witnesses in the case or knew Curtis Flowers. He said one woman was late to court a couple of times and that several prospective jurors had gone back and forth on whether they supported the death penalty. Evans said that one woman was related to Curtis Flowers. He said one of them worked with Curtis' father and one worked with his sister and that two prospective jurors had been sued by Tardy Furniture over furniture bills.

The Judge, Joey Loper, accepted those reasons. Here's the judge in a recording made by a reporter who covered the trial.

Joey Loper: I do not find there to be sign that there was any racially discriminatory motives behind the jury that was selected.

But Curtis' lawyers are arguing that, no, the reasons Doug Evans gave for striking those prospective jurors were false. They were just excuses, pretexts that Doug Evans was using to strike people from the jury because they were black. Curtis' lawyers said that Evans had accepted white prospective jurors who had given similar answers. They pointed out that there was a white person in the jury pool who had mixed feelings about the death penalty, whom Evans did not strike. And that were several white people who weren't struck who knew people in the Flowers family and knew other witnesses.

Like Larry Wayne Blaylock, one of the white men who made it on to the jury in Curtis' sixth trial. Larry Blaylock got on the jury specifically because Doug Evans selected him. He was Evans's pick. Larry Blaylock says he was surprised he ended up on the jury, because he knew so many of the people involved in the case.

Larry Blaylock: I was friends with all of them, basically. I mean, Roxanne and I went to school together.

Roxanne is the daughter of one of the victims.

Larry Blaylock: I knew Ms. Tardy, you know, Roxanne's mama. I mean everyone up there knew it. And I knew the district attorney, I knew John Johnson, I knew him and...good friends with him, you know?

And it wasn't just that Larry Blaylock was friends with a family member of the victims and friends with the lead investigator and even knew Doug Evans. He also knew one of the state's witnesses who testified about seeing Curtis on the day of the murders.

And there was another thing.

Larry Blaylock: I told them I had a cousin that had committed murder, and the district attorney, Mr. Evans stood up and said, 'Yeah I'm the one who prosecuted him.' I said, 'Yes you are.' It was no way I was going to get picked, you know. But I did, I did get on there, I ain't gonna say I didn't.

The state is being represented by the Mississippi Attorney General's Office. And the A.G.'s office has argued in legal filings that Doug Evans did not strike black people because of their race, and that there's nothing extraordinary about what happened in jury selection in trial six. In one of the briefs, the state writes that in the Curtis Flowers case, there are no, quote, "smoking guns," there are no racist notes, no written manual saying to strike all the black people. The A.G.'s office acknowledges that, yes, Doug Evans did ask black prospective jurors more questions, but they say that was because their answers were, quote, "unclear or needed further elaboration". The white prospective jurors, on the other hand, gave answers that were, according to the state, quote, "satisfactorily clear". With the white prospective jurors, the A.G.'s office writes, quote, "There was nothing for the State to question."

I wanted to get a better sense of what to expect when the Court considers Curtis' case, so I decided to talk to a man named Dan Epps.

Dan Epps is a law professor at Washington University in St. Louis. He's an expert on the Supreme Court. And he has insider experience, too. He used to clerk for Justice Anthony Kennedy back in 2009 and 2010.

Madeleine Baran: What I thought would be great to talk with you about is to kind of take us behind the scenes of how this works from the very beginning of this process to all the way through what we could expect, to kind of take us through what that looks like.

Dan Epps: Yeah, absolutely. You know the Supreme Court, you know, has two big roles, two big jobs. It decides cases and it decides what cases it's going to decide. You know, it gets thousands of these petitions and only grants a very, very small number of them, something on the order of one percent. I mean, the odds are, you know, it's not one in a million, but it's basically like winning the lottery.

Dan Epps told me he was surprised the Court took this case because it's precisely the kind of case the Court usually rejects.

The kinds of cases the Supreme Court is looking for, most of the time, are cases that have national significance, like *Bush v. Gore*. They can be cases where lower courts disagree, like one appellate court ruled one way and another court ruled another. They can be cases that involve big constitutional issues like *Roe v. Wade*.

Epps says that what the Court usually doesn't care about are criminal cases where a defendant is saying a mistake was made, like Curtis' case. Epps says the Court calls these cases "fact-bound."

Dan Epps: People in the public have this perception that the Supreme Court is where you go if you suffered a really great injustice. To be honest, you know, most of them don't really care, because they're looking for issues that affect many, many cases — and any one case, if it's just a fact bound-error, is less important to them. I mean, some of them care more than others, but that's really, I don't think that's how any of them see their role. They just think, you know, 'We're too busy. Our job is just to resolve issues that affect a bunch of people, do things that are of national significance.'

The Court gets so many petitions every year that there's no way the nine justices themselves could read all of them to decide which ones to take. So that job is handled by the clerks, the lawyers who work for the justices. They make the first pass. Dan Epps himself read hundreds of these petitions back he was clerking for Justice Kennedy. He told me that after the clerks read a petition, they write a memo.

Dan Epps: At the end of the memo you say, 'I recommend that the Court grant this petition, deny this petition.' Most memos say 'deny.'

Then the nine justices meet to decide what to do.

Dan Epps: They'll get together and, you know, people will look at the memo, they'll look at other things and then they'll, they'll talk about it.

Madeleine Baran: So, what are they discussing when they discuss the case?

Dan Epps: Well, I don't totally know because the conferences are secret, and they never let clerks attend them.

Madeleine Baran: Really?

Dan Epps: Yeah. That's the one thing you're not allowed to do when you're a clerk. The conference is just the justices. And the most junior justice, it's your job to answer the door if somebody knocks and they're trying to give a note to the justices—.

Madeleine Baran: Oh my gosh.

Dan Epps: —try and get a note to the justices. And so Justice Breyer — there were no appointments to the Court between 1994 and 2005, so Justice Breyer was stuck answering the door for 11 years. Somebody's got to do it and it's, so the junior justice,

and the junior justice, you know, on a court of you know octogenarians, the junior justice is often you know 55 or 60.

Madeleine Baran: Right. A child.

Dan Epps: Sometimes a little younger than that. Yeah.

So the clerk's memo from Curtis' case is secret. And the conference between the justices where they discussed that memo is also secret.

But we do know one thing, which is that after that conference, the Supreme Court did agree to hear Curtis' case.

Madeleine Baran: Why do you think they took Curtis's case?

Dan Epps: Well, I mean, so a few reasons. So, one, this is, this is kind of weird and this is a weird thing to say, but in some ways, it is very fortunate for Curtis that he was sentenced to death in the sense that he now has a chance in this case to have his entire conviction overturned. And I think if he just got a life sentence, it's not certain that the same thing would be happening, that this court case would be before the Supreme Court of the United States. The capital cases just get that much more attention. And so, you know, it's weird to say that, it's weird to say it's fortunate, obviously it's not fortunate for him. But in some ways being able to come into the Court with 'capital case' on your petition, it doesn't hurt. Um, you know the Court also, you know, has paid attention to racial discrimination in capital cases. You know, even the sort of, some of the more conservative justices have indicated that they're troubled by this. And so if you come into the Court, you know, and you can have a credible claim that you were a, particularly if you're an African American defendant who suffered racial discrimination in a capital case, your odds of getting your case granted are a little higher. Still not great. Still not great. So those things, those things help. None of those things get you to, you know, a lock by any means.

Madeleine Baran: So maybe partly because it's a capital case, a death penalty case, partly because this is an issue that the Court feels strongly about. But it sounds like neither of those things alone would do it.

Dan Epps: No. And I do think—

Madeleine Baran: And so we don't really—do we just not know exactly what it is?

Dan Epps: We don't. You know, I do think, you know, I don't want to suck up too much, but I do think that your reporting, I mean I don't think it hurt.

So that's how Dan Epps thinks the case got to this point. Now the question is what will the Court decide? There are nine justices on the Supreme Court. If Curtis is going to have his conviction overturned, he needs at least five of the justices to vote in his favor.

So I asked Dan Epps to game it out a bit, to give me his best guess as to how each of the justices might vote in this case. We started out with the more liberal justices, all of whom have been appointed by Democratic presidents. There are four of them: Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan.

Dan Epps: You know, they are generally more favorable towards criminal defendants. They're very concerned about racial discrimination. They're concerned about injustice in the criminal justice system, all that stuff. And it's all gonna push in the same direction here. I'd be shocked if they're not all on the side of Curtis Flowers.

So that's four possible votes for Curtis. Then Dan Epps and I moved onto the more conservative justices, like Justice Samuel Alito. He was appointed to the Court by President George W. Bush.

Dan Epps: So Justice Alito is, you know—for people who care a lot about criminal justice and are sort of often on the defendant's side, he's kind of like a super villain. He's very smart. He's a very good writer. He's a former prosecutor. And it is pretty rare for him to vote for criminal defendants. Extremely rare. That said, he wrote the decision in Snyder about 10 years ago. So he wrote a Batson, you know, a pro-defendant Batson decision. Madeleine Baran: One of the cases that was overturned because of Batson by the U.S. Supreme Court.

Dan Epps: Yeah.

But Dan Epps told me overall, Justice Alito is a much better bet for the state. He's not that likely to side with Curtis. So that's four possible votes for Curtis, one possible vote against.

Next, I asked about Justice Neil Gorsuch. He's one of the newer justices on the Court. He was appointed by President Trump. Dan Epps says Gorsuch is also more likely to side with the state.

Dan Epps: Gorsuch is very rigid. He is sort of very ideologically rigid. You know, I think I might peg him somewhere around where Alito is.

And then there's Justice Clarence Thomas.

Dan Epps: He is just extremely conservative. I would also put Justice Thomas in the "against Curtis" box.

Madeleine Baran: Like that's probably, of anybody, you can be the most confident of that.

Dan Epps: I feel pretty good about that, yeah.

So that's four possible votes for Curtis and three possible votes against him. That leaves two more.

Madeleine Baran: OK, So what about the newest justice, Justice Kavanaugh?

Dan Epps: So Kavanaugh is interesting. He's a little bit of a wildcard. So he's starting off from a baseline of being pretty conservative. My initial sense of him is — so a couple of things. So one is that he is a little bit less rigid ideologically than Gorsuch, sort of more willing to just sort of to say as a matter of common sense, 'This stinks. Right? I don't like

this. Like you know let's, let's—. This bothers me.' You know, whether this one will bother him or not I have less insight into, but I think it is more possible.

So four possible votes for Curtis, three possible votes against and one wild card. That leaves just one more justice, the Chief Justice, John Roberts. And Epps told me, that's where this could get interesting, because even though Roberts was appointed by a Republican, he's not as reliably conservative on this particular issue as some of the other justices.

Dan Epps: He seems, you know, bothered by racism in the criminal justice system with respect, particularly with respect to capital cases.

Justice Roberts actually wrote the opinion in the Foster case, that big jury discrimination case that Stephen Bright argued in front of the Court, the one where Bright got a hold of those notes.

Madeleine Baran: For people who don't know the significance of being the one to write the opinion, can you say why that's important?

Dan Epps: So it's particularly important for the chief justice whether he wrote an opinion because the chief justice's power on the Supreme Court — you don't get extra votes, you have the ability to choose who writes an opinion if you're in the majority for that opinion. And so, any time the chief justice writes an opinion, he chose that case himself. He said 'I want that one. I'm going to take that one. Of all the cases I could take this month, that's the one I want to write. I care about that.'

John Roberts: I have the opinion of the Court in case 14-8349, Foster versus Chatman.

This is Justice Roberts announcing the decision in the Foster case. In it, Justice Roberts focuses on two prospective black jurors whom the prosecution struck, Marilyn Garrett and Eddie Hood.

John Roberts: Now it is unconstitutional to strike a prospective juror on account of race. So the prosecution offered race-neutral reasons for each strike.

Justice Roberts goes through the reasons that the state gave. And he takes them down one by one.

Like the prosecution had said that the son of one of the black prospective jurors had committed a crime similar to the crime for which Foster was being tried.

John Roberts: For, and I quote, "basically the same thing that this defendant is charged with."

But Justice Roberts pointed out that Foster was being tried for murder, while the prospective juror's son had stolen some hubcaps. Comparing the two crimes?

John Roberts: That's nonsense.

Justice Roberts instead focused on those notes, the notes that the prosecution had made as part of jury selection.

John Roberts: The document then states, quote again, "No, no black church." The word NO is capitalized, the word black is underlined.

And he said they showed that the real reason these jurors were struck was because they were black.

John Roberts: In sum, we are left with the firm conviction that the strikes of Garrett and Hood were motivated in substantial part by discriminatory intent. The order of the Georgia Supreme Court is accordingly reversed...

Madeleine Baran: So when he made that decision in the Foster case, what does that tell us?

Dan Epps: You know, you're taking that opinion for a reason. I don't know whether it's because you think it's important, you think it's important to send a message about the impropriety of this kind of racism, whatever. He thought it was important enough that not only did he vote in favor of the defendant, he was gonna be the one to write the opinion. So he thinks it's important, he cares. That's my sense.

Madeleine Baran: And so, for people who are thinking, 'But Justice Roberts, he's a conservative. He was appointed by a Republican,' I think one of the responses to that might be, well it is not at all that simple when we're talking about these questions.

Dan Epps: Yeah, it gives you a lot of information, but it doesn't tell you the whole story. And in a case like this, this case is not going to be solely dictated by party affiliation. And the chief justice in particular, he has more of that streak I was talking about a second ago of, you know, just kind of common sense. Like, 'Come on, this is ridiculous.' Like, 'I don't like this.'

Madeleine Baran: So he could be, you know, you've got the four more liberal justices. It sounds like you think Justice Roberts could join them in overturning it.

Dan Epps: Yeah, I feel like he is—. He is definitely in my view the most likely of the conservative justices. And I would have Kavanaugh come after that.

Madeleine Baran: And Curtis only needs one of them to win.

Dan Epps: Yes.

So that's Dan Epps' take on the individual justices.

But Epps says there's something else to consider, and that is that the fact that the Court took the case in the first place already gives us a pretty good clue about what they might do.

Because if the Court had 100 percent made up its mind that Curtis' conviction should stand, then it just wouldn't take the case.

Because if the Supreme Court doesn't take a case, whatever the lower court's ruling is stands. And in Curtis' case, the lower courts have upheld his conviction.

So if the Supreme Court doesn't have a problem with a case like Curtis', the best thing to do is nothing.

Dan Epps: These justices, and especially I think Chief Justice Roberts, you know they care about the Court's public image. And it is not a good idea for them to grant argument in a case that involves some real excesses of southern justice, involving some very complicated and troubling racial politics and then say, 'Yeah we think this is fine.' Like, that would be, that would be not a smart thing for them to do. And they're smart enough not to do that.

Madeleine Baran: So from an optics perspective it would be better to just not take that case than to take it and affirm the conviction, not overturn it.

Dan Epps: Absolutely. Yes and be like, 'We think this, you know, thing that a lot of people think is a travesty, we think this is fine.' Why would you do that? That doesn't make any sense. That makes very little sense. And that is why I feel, let's say, fairly confident he's gonna win at the Supreme Court. You know, you know being a Supreme Court pundit is like being the weatherman. I mean, you know, you can be wrong all the time and you keep your job. But I feel pretty confident of that.

I reached out to the lawyers on both sides of the Flowers case. Curtis' lawyers declined to be interviewed in the lead-up to oral arguments.

The Mississippi Attorney General's office, which will be arguing the case for the state, wouldn't comment either.

One person who did talk to us, although just briefly, was the District Attorney Doug Evans. Our reporter Parker and our producer Natalie caught up with him for a few minutes in January, outside a courthouse in Choctaw County, Mississippi.

Doug Evans told them that he thinks the case is just as strong as it's been from the beginning.

As for whether he would try the case again if the Supreme Court overturns the conviction, Doug Evans wouldn't say. He said if it's overturned, quote, "I'll have to look at it at that point."

But, he said, quote, "I don't think it's gonna be reversed. The facts are there."

One person I haven't talked to about any of this is Curtis Flowers. The prison still won't let me visit Curtis or talk to him on the phone. And his lawyers still won't let him write to me.

But we have spent a lot of time talking with Curtis' family in the months since the podcast came out. We've been back to Winona many times.

*Natalie Jablonski: Hey it's Natalie and Parker.
Archie Flowers: Y'all come on in.*

Natalie and Parker went to see Curtis' father Archie Flowers in January.

Archie Flowers: How you doing, how you doing, how you doing?

It'd been six months since Mr. Flowers' wife Lola had died.

Archie Flowers still lives in the same house, and when Natalie and Parker visited, the dining room table was still set the way Mrs. Flowers had arranged it last year. The pillows were still arranged the same way on the couch. Only this year, Mr. Flowers hadn't bothered to put up a Christmas tree.

Archie Flowers: I had some rough time comin' through Christmas holiday and things.

But he said his other kids have been stopping by a lot to check on him.

Archie Flowers: Every time you turn around, somebody's at the door. (Archie knocks on something). 'Dad.' I told the kids, 'Don't y'all come by here, checking on me.' I said, 'Your daddy's going to be all right.'

It had been a couple of months since the Supreme Court announced it would hear Curtis' case

Natalie Jablonski: Have you been following the case at all that's going to the Supreme Court?

Archie Flowers: Feeling pretty good about it. It's moving along. I mean, you know, seems like to me, I mean. but I just be so glad when they get this thing straight.

Natalie Jablonski: Have you thought about going to the oral arguments at all for the Supreme Court?

Archie Flowers: Where is it supposed to be at?

Natalie Jablonski: It'll be in Washington D.C.

Archie Flowers: Washington D.C.? You know how old I am. I hate traveling. Since I got this age on me you know, you get old.

Archie Flowers doesn't like to travel, but he still makes the 80-minute drive out to Parchman prison every two weeks.

Archie Flowers: I went to see Curtis yesterday.

Natalie Jablonski: Have you talked to him about the Supreme Court news at all?

Archie Flowers: No. I don't. I really don't.

Natalie Jablonski: Really?

Archie Flowers: I can't.

Natalie Jablonski: Why not?

Archie Flowers: It make me feel bad, you know, him sitting there and he just — I just can't.

Natalie Jablonski: Do you let yourself think about that moment, like what would happen if the Supreme Court did overturn the conviction?

Archie Flowers: I hadn't thought about that. I don't know honey, tell you the truth. I just, I just feel terrible, you know. I just, I don't know. I just, I guess I should be thinking about that, but I guess I don't, not too many times. I just pray and hope. Hope he get free, 'cause he, you know, I mean, hey, that was dirty. What kind of law?

Oral arguments are tomorrow, March 20. We'll be there in D.C. reporting on what happens. And we'll have an episode about it out soon.

And in the meantime, we'll be posting updates on our website In-the-Dark-podcast.org. We've also got a breakdown of how Doug Evans picked jurors in Curtis' sixth trial, and an analysis of the Supreme Court's previous rulings on race in jury selection. Also, on our website, you can sign up for our email list. That's the best way to stay on top of breaking news in the case and get information on when new episodes are coming out. You can sign up at inthedarkpodcast.org.

And while you're there, think about donating some money to support our work. This kind of in-depth reporting is only possible because people like you support it. You can make a donation today at inthedarkpodcast.org

In the Dark is reported and produced by me, Madeleine Baran, senior producer Samara Freemark, producer Natalie Jablonski, associate producer Rehman Tungekar, and reporters Parker Yesko and Will Craft.

In the Dark is edited by Catherine Winter. Web editors are Dave Mann and Andy Kruse. The Editor in Chief of APM Reports is Chris Worthington. Original music by Gary Meister and Johnny Vince Evans. This episode was mixed by Corey Schreppel. And thank you to Monica Land, who provided us the audio of Judge Loper during trial six.